FILED BY CLERK
NOV -3 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TRINIDAD ALBERTO INCLAN, Appellant.	)	2 CA-CR 2011-0102 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102821001

Honorable John S. Leonardo, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Appellant Trinidad Inclan drove his car while intoxicated early in the morning on July 14, 2010, while his license was suspended. He was convicted after a jury trial of aggravated driving while under the influence of an intoxicant (DUI), a felony, based on his having driven while his driver license or privilege to drive in Arizona had been suspended. The trial court imposed a presumptive, 2.5-year term of imprisonment. On appeal, Inclan contends his aggravated DUI conviction should be vacated and reduced to a misdemeanor DUI conviction because the state presented only inadmissible hearsay evidence to prove that he knew or should have known his driver license was suspended. We affirm for the reasons stated below.

¶2 Inclan asserts "[t]he State's proof that [he] knew or should have known that his license to drive had been suspended or revoked consisted entirely of inadmissible double hearsay." Because Inclan did not object on this ground below, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). To convict Inclan of aggravated DUI, the state was required to prove beyond a reasonable doubt that Inclan's license or his privilege to drive in Arizona had been suspended at the time he committed the offense and that he "knew or should have known" about the suspension. *See State v. Williams*, 144 Ariz. 487, 489, 698 P.2d 732, 734 (1985) (driving without license requires culpable mental state; culpable mental state requires state prove defendant knew or should have known license suspended); *see also* A.R.S. § 28-1383(A)(1). "The state is not required to prove actual receipt of the notice or actual knowledge of the suspension" of the Arizona driver license or the privilege to

drive in Arizona. *See* A.R.S. § 28-3318(E); *State v. Cifelli*, 214 Ariz. 524, ¶ 13, 155 P.3d 363, 366 (App. 2007).

¶3 At trial, Annie Garigan, custodian of records for the Arizona Motor Vehicle Division (MVD), testified that the MVD abstract for Inclan showed that his driving privileges had been suspended, at the time of his arrest in this matter on July 14, 2010, and that on August 15, 2009, a law enforcement officer had served Inclan personally with notice his license was suspended. Garigan also testified that Inclan had been issued numerous identification cards, presumably because his license had been suspended, the last of which was issued in September 2010. She additionally testified that Inclan had not been notified by mail that his license had been suspended. Inclan argues that, because Garigan's testimony was the only evidence showing he knew his license was suspended, and because the officer who actually had served the notice of suspension did not testify, Garigan's testimony was based on inadmissible hearsay that should have been excluded pursuant to Rule 802, Ariz. R. Evid.

¶4 In general, "out of court statements offered in evidence to prove the truth of the matters asserted in the statements are inadmissible." *State v. Valencia*, 186 Ariz. 493, 497, 924 P.2d 497, 501 (App. 1996); *see also* Ariz. R. Evid. 801(c), 802. However, there are several exceptions to the hearsay rule. *See* Ariz. R. Evid. 803, 804. And, "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Ariz. R. Evid. 805. One such exception exists for "public records and reports." Ariz. R. Evid. 803(8) (unless lack of trustworthiness is indicated, the hearsay rule does

not exclude "records, reports, statements, or data compilations . . . of public offices or agencies," setting forth "activities of the office or agency," or "matters observed pursuant to duty imposed by law as to which matters there was a duty to report"); *see also State v. King*, 213 Ariz. 632, ¶¶ 28-31, 146 P.3d 1274, 1280-81 (App. 2006).

¶5 Although Inclan "does not contest that the state introduced admissible evidence that MVD had observed and reported that [his] license had been suspended sometime prior to July 14, 2010," he asserts that because he was served personally with the suspension by a police officer, and not by MVD or an agent thereof, the record setting forth that service "was not a record of MVD setting forth **its** activities for purposes of Rule 803(8)(A)."

¶6 Notably, the state contends Inclan's license was suspended in August 2009 because he refused to consent to a blood test, a fact Inclan apparently does not dispute.[1] Section 28-1321(D)(2)(b), A.R.S., requires a law enforcement officer, "[o]n behalf of the department, [to] serve an order of suspension on the person" "[i]f a person under arrest refuses to submit to [a blood alcohol] test." The "'[d]epartment' means the department of transportation acting directly or through its duly authorized officers and agents." A.R.S. 28-101(15). The MVD is a division of the department of transportation. A.R.S. § 28-332(D)(1).[2] Thus, the law enforcement officer who served Inclan with the notice of suspension in August 2009 acted on behalf of the department of transportation and MVD.

[1]Although the portion of the record the state relies on to support this assertion is not part of the record on appeal, Inclan has not challenged this assertion.

[2]Previously A.R.S. § 28-332(C)(1). *See* 2011 Ariz. Sess. Laws, ch. 280, § 1.

Therefore, the driving record about which Garigan testified was a record of MVD's activity and thus was admissible under Rule 803(8)(A). *Cf. State v. Ekmanis*, 180 Ariz. 429, 431-32, 885 P.2d 117, 119-20 (App. 1994) (accepting MVD records as evidence to withstand motion for judgment of acquittal).

¶7 For the reasons stated, we conclude there was sufficient evidence from which reasonable jurors could have found beyond a reasonable doubt that Inclan knew or should have known his driver license had been suspended. We thus affirm the conviction and sentence imposed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge